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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations,)
(Caldwell, College Station and)
Gause, Texas))

MM Docket No. 91-58

RM-7419

RM-7797

RM-7798

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

Bryan Broadcasting License Subsidiary, Inc. ("Bryan"), by its attorneys, hereby opposes the Petition for Reconsideration ("Petition") filed on March 15, 2000 by Roy E. Henderson ("Henderson"). In the Petition, Henderson requests that the Commission reconsider its decision in the *Memorandum Opinion and Order* in the above-referenced proceeding, released February 15, 2000 ("*MO&O*"). Henderson bases his Petition on three main arguments, two of which essentially reargue earlier contentions of Henderson's which were rejected by the Commission in its *MO&O*. The other argument is another in a long line of late-filed attempts by Henderson to remedy the weakness in his case. For the reasons set forth below, the Commission should deny Henderson's Petition.

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Discussion

I. As Declared By The Commission Itself, Henderson's Reasoning For Assuming His Tower Will Obtain FAA Approval Fails.

In his Petition, Henderson again attempts to argue that the Commission should assume that his tower will obtain FAA approval because another, slightly higher tower is located nearby.

Proving the availability of a tower at a specific site is essential to Henderson's *Woodstock*¹ argument that, even though his proposal cannot place a city grade signal over any of his city of license using normal predictive methods, the use of alternative methods will allow him to demonstrate such coverage. The *Woodstock* case demands that, as a prerequisite to such a showing, the applicant demonstrate the availability of his proposed site, and its FAA approval, as such a showing is so site-dependent. In this case, Henderson has never demonstrated FAA approval for a tower at his proposed site. Instead, Henderson has claimed that the FCC should recognize that FAA approval would be forthcoming in the future, since there is another taller tower only 1.2 miles from his proposed site that has FAA approval. In the *MO&O*, the Commission rejected this argument.

Now, instead of relying on a tower 1.2 miles away, Henderson claims that the existence of another FAA-approved tower, six miles away from his proposed site, makes his tower an automatic recipient of FAA approval. The Commission must again reject this argument. Regardless of whether Henderson finds an FAA-approved tower that is 6 miles, 1.2 miles or 0.6 miles away from his proposed tower, the FAA has not approved Henderson's particular tower, as is required by the *Woodstock* decision and the *MO&O*. His contention that his tower should automatically be considered to have FAA authorization based on the existence of these other towers is a repetitive attempt to reargue a position that's already been rejected by the Commission. As the Commission clearly stated in the *MO&O*, "[t]his argument fails."² Henderson must receive FAA approval for his proposed tower site. He cannot assume that he has FAA approval because other towers at other sites have been approved. See Exhibit A, attached hereto, an affidavit of engineering consultant Roy Stype, certifying that changes of only a few hundred feet have caused FAA approval status to

¹ *Woodstock and Broadway, Virginia*, 3 FCC Rcd 6398 (1988).

² See *MO&O* at ¶ 9.

change. As the Commission stated in the *MO&O*, Henderson must get approval from the FAA for his specific tower.³ Henderson's attempt to have the Commission reconsider an argument it has already disposed of just because Henderson has now found another FAA-approved tower even further from the one he proposes is a waste of the Commission's time. The Commission will not grant reconsideration to debate arguments that it has already carefully considered.⁴ The Commission has already stated that this argument "fails," consequently, Henderson's Petition can be afforded no relief based on this argument. It should be noted that, even if his *Woodstock* proposal is accepted, Henderson still does not provide Caldwell with full city-grade coverage.⁵

II. Henderson's Specification of a New Site, Regardless of Whether It Complies With Section 73.315(a) Is Irrelevant To This Allotment Proceeding.

Next, Henderson asserts that the Commission should reconsider its decision in the *MO&O* based on the fact that he is now able to specify a site that will allow him to fully comply with Section 73.315.⁶ Henderson bases this argument on the fact that Station KVIC(FM) at Victoria, Texas, has received a construction permit for a downgrade in its facilities, which might permit Henderson to locate a fully-spaced site capable of covering Caldwell with a city-grade signal. However, it is well settled that the proponent of a change in the Table of Allotments must put forward a change which

³ See *MO&O* at ¶ 9.

⁴ See *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). See also Section 1.429(b) of the Commission's Rules, which states that Petitions for Reconsideration must "rely on facts that have not previously been presented to the Commission."

⁵ See *MO&O* at ¶ 9..

⁶ On February 24, 2000, Henderson filed a "one-step" application to effectuate this change. However, the "one-step" application is unacceptable, due to the fact that the Commission revised the Table of Allotments to reallocate the channel for which Henderson seeks authorization, pursuant to Bryan's request herein. As that order has not been stayed, Henderson's application must be dismissed. Bryan will be filing a request for dismissal with the Commission under separate cover.

is acceptable by the deadline for filing counterproposals in a proceeding.⁷ It is irrelevant to the Commission whether Henderson has finally located a site that will comply with the Commission's technical rules. At the time proposals were due in this proceeding, Henderson could not put forward a proposal which would cover ANY of his city of license with a city grade signal. His proposal now is simply too little, too late. If the Commission were to credit Henderson's proposal based on changes made more than 8 years after this proceeding began, it would be encouraging the filing of frivolous allotment requests. Any applicant could submit an unacceptable proposal, and continue to appeal its rejection, hoping that one day, if he appealed long enough, there might be some change in the facilities of other stations which would make his proposal acceptable. This would clog the allotment process with a host of flawed proposals - a result which cannot be countenanced by the Commission. Thus, Henderson's last-minute attempt to bring his proposal into compliance with Section 73.315 can have no effect on this proceeding and, therefore, cannot be considered by the Commission.

Moreover, even with the new site, Henderson's proposal is still not acceptable. The new site proposal is contingent on the effectuation of the downgrade of Station KVIC(FM), Victoria, Texas from a Class C1 to a Class C3. While a construction permit was issued in August 1999 for this downgrade, contrary to Henderson's assertions, no license application has yet been filed. Henderson is basing his request for a new site on the assumption that Station KVIC(FM) will actually downgrade, but this is not a certainty. The licensee of Station KVIC(FM) could turn in its

⁷ See *Santa Margarita and Guadalupe, California*, 4 FCC Rcd 7887 (1989) (stating that permitting counterproposals after the counterproposal cut-off date would "prejudice all parties who complied with comment dates, would prolong resolution of allotment proceedings and would unreasonably delay provision of service"); *Corpus Christi and Three Rivers, Texas*, 11 FCC Rcd 517 (1995) (stating that "proposed resolution" filed on reply comment date was an untimely-filed counterproposal); *Clinton, Saint Pauls and Southern Pines, North Carolina*, 6 FCC Rcd 4377 n.4 (1991). See also Section 1.420 of the Commission's Rules (stating that counterproposals shall be advanced in initial comments only or they will not be considered).

construction permit and continue to operate with its licensed facility as a Class C1, which would again leave Henderson with no site capable of placing a city-grade signal over his city of license. Would Henderson have us further delay this already absurdly prolonged proceeding while we see whether the Victoria licensee actually downgrades? Henderson himself has already chastised the Commission for delays in this proceeding in the context of his Status Reports filed with the Court of Appeals in this case. Yet his proposal to wait on Victoria, and the very filing of this Petition, have the effect of further postponing the resolution of this case. Further delay in this proceeding cannot be tolerated. As Henderson's proposal was unacceptable at the deadline for acceptable proposals - the deadline for the filing of counterproposals - his late-filed, speculative attempt to remedy his problems must be rejected.

III. In the MO&O, the Commission Was Correct In Not Considering Henderson's Allegations Against Bryan's Site Change Applications.

Henderson also claims, yet again, that Bryan's site change applications, filed on FCC Form 301 after the effective date of the allotment changes made in this proceeding, were improperly used by the Commission to make its decision granting Bryan's allotment proposal. Once again, Henderson misses the point addressed by the Commission in its *MO&O*. In the *MO&O*, the Commission intentionally does not consider Henderson's allegations about Bryan's site change applications because the applications are irrelevant to the allotment proceeding.⁸ Compliance with the city-grade coverage requirements is judged differently at the application stage than at the allotment stage, therefore, site changes are irrelevant at the allotment stage. At the allotment stage, a strict compliance standard is necessary to insure flexibility to locate a suitable site, since an allotment proponent is not typically committed to a specific site. At the application stage, however,

⁸ See *MO&O* at ¶ 12 ("These allegations will be considered in the context of that application proceeding").


a more lenient standard can be applied because a specific site is being selected by the applicant. Thus, Bryan's proposals in its applications are irrelevant to the merits of its allotment proposal. The Commission's decision on this point is fully consistent with precedent. See *Greenwood, Seneca, Aiken and Clemson, South Carolina, and Biltmore Forest, North Carolina*, 3 FCC Rcd 4108 (1988) ("The Commission generally cannot, in the course of rule making proceedings, evaluate the actual transmitter sites that will be specified in applications not yet filed. . . . [C]onsideration . . . at the allotment stage would, thus, be premature"). Thus, contrary to Henderson's repetitive protestations, this decision must be upheld.

Conclusion

For the reasons set forth above, the Commission should dismiss Henderson's Petition.

Respectfully submitted,

**BRYAN BROADCASTING LICENSE
SUBSIDIARY, INC.**

By: 
David D. Oxenford
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Dated: March 30, 2000

EXHIBIT A

**ENGINEERING STATEMENT IN
SUPPORT OF OPPOSITION TO
PETITION FOR RECONSIDERATION
MM DOCKET 91-58**

**Bryan Broadcasting License Subsidiary, Inc.
College Station, TX**

March 30, 2000

**Prepared For: William R. Hicks
Bryan Broadcasting
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Bryan, TX 77805**

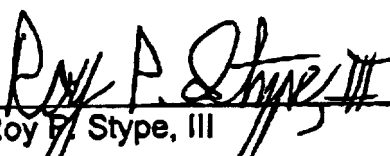
CARL E. SMITH CONSULTING ENGINEERS

ENGINEERING AFFIDAVIT

State of Ohio)
) ss:
County of Summit)

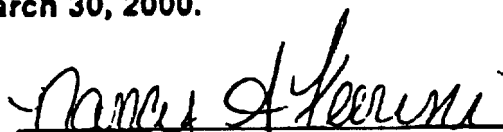
Roy P. Stype, III, being duly sworn, deposes and states that he is a graduate Electrical Engineer, a qualified and experienced Communications Consulting Engineer whose works are a matter of record with the Federal Communications Commission and that he is a member of the Firm of "Carl E. Smith Consulting Engineers" located at 2324 North Cleveland-Massillon Road in the Township of Bath, County of Summit, State of Ohio, and that the Firm has been retained by the Bryan Broadcasting License Subsidiary, Inc., to prepare the attached "Engineering Statement In Support of Opposition To Petition For Reconsideration - MM Docket 91-58."

The deponent states that the Exhibit was prepared by him or under his direction and is true of his own knowledge, except as to statements made on information and belief and as to such statements, he believes them to be true.



Roy P. Stype, III

Subscribed and sworn to before me on March 30, 2000.



Notary Public

/SEAL/

NANCY A. FERRINI, Notary Public
Residence - Cuyahoga County
State Wide Jurisdiction, Ohio
My Commission Expires March 13, 2005

ENGINEERING STATEMENT

This engineering statement is prepared on behalf of the Bryan Broadcasting License Subsidiary, Inc., licensee of Radio Station KTSR(FM) - College Station, Texas. KTSR presently operates on Channel 221A, but holds a construction permit for operation on Channel 236C2 in order to implement the upgrade from Channel 221A to Channel 236C2 authorized in MM Docket 91-58. On March 15, 2000, Roy E. Henderson ("Henderson") filed a petition for reconsideration of the FCC's February 15, 2000 Memorandum Opinion and Order in this rulemaking proceeding. This engineering statement is prepared in support of an opposition to this petition for reconsideration.

Henderson was the proponent of a conflicting proposal in this rulemaking proceeding which proposed to substitute Channel 236C2 for Channel 236A in Caldwell, Texas. This proposal was denied, however, because the proposed facilities would fail to provide the required city grade coverage to 100% of Caldwell, as required at the rulemaking stage by Section 73.215(a) of the FCC Rules. In fact, when uniform terrain is assumed, as is normally required at the rulemaking stage, the predicted city grade contour for Channel 236C2 in Caldwell would fail to encompass any portion of Caldwell.

In this petition for reconsideration, Henderson continues to claim that his proposal for Channel 236C2 in Caldwell is eligible for a Woodstock exception to the requirement that uniform terrain be assumed in evaluating city grade coverage at the allotment stage, which would permit actual terrain data to be factored into the evaluation of city grade coverage. In order to be eligible for such an exception, however, it is necessary for the proponent to both have reasonable assurance of the availability of the proposed site and to have FAA approval for a tower of adequate height at this site to permit the

city grade contour to encompass 100% of the proposed community of license when actual terrain is considered.

It is undisputed, however, that Henderson has never obtained FAA approval for a tower of any height at the proposed reference coordinates for Channel 236C2 in Caldwell. Instead, this petition for reconsideration simply reiterates the contention, previously rejected by the FCC, that the presence of a tower standing 152 meters (500 feet) above ground 1.2 miles from these reference coordinates assures that FAA approval could be obtained for a tower of adequate height at the proposed Caldwell reference coordinates. It also futilely attempts to bolster this argument by citing the recent approval by the FAA of a tower standing 204 meters (670 feet) above ground at a location approximately 6 miles southeast of the proposed Caldwell reference coordinates.

In spite of claims to the contrary made by Henderson, neither of these towers provides any guarantee that FAA approval could be obtained for a tower of adequate height at the actual proposed reference coordinates for Channel 236C2 in Caldwell. Under the criteria utilized for obstruction evaluation by the FAA, particularly those related to instrument approach procedures, a difference of less than 100 feet in the location of a tower can make the difference between a structure being approved by the FAA and a structure being considered a hazard to air navigation. It is for this reason, that the FAA requires that an entirely new aeronautical study be conducted for any change whatsoever in the geographic coordinates of a proposed tower, as well for any correction whatsoever in the geographic coordinates of an existing tower.

Thus, Henderson's claim that the existence of these two towers guarantees the receipt of FAA approval for a tower of adequate height at the proposed Caldwell reference coordinates is totally without merit. Accordingly, having failed to satisfy the sec-

ond requirement for a Woodstock exemption, the Caldwell proposal must be evaluated based on uniform terrain, which results in it failing to provide a city grade signal to any portion of Caldwell.

CERTIFICATE OF SERVICE

I, Karleen Lamie, do hereby certify that I have this 30th day of March, 2000, mailed by first-class United States mail, postage prepaid, copies of the foregoing “**Opposition to Petition for Reconsideration**” to the following:

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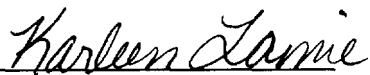
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***Hand Delivery**